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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1437

PHYLLIS LYNCH, KELLY M. ALEXANDER, JR., ROBERT STEELE, AND FLEDORA GRIER, PETITIONERS,

versus

FRANK W. SNEPP, THOMAS F. MOORE, JR., DONALD W. STAHL, AND ALL PERSONS IN STAHL'S EMPLOY, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Whether the Court of Appeals was correct in reversing, for want of sufficient evidence that "the State proceeding cannot eliminate the threat to plaintiffs' rights", a Federal District Court Preliminary Injunction against that part of a State Court Injunction which prohibited the Federal plaintiffs, adult organizers of student chapters of the National Association for the Advancement of Colored People, from going on to public school premises without "permission from school authorities", when the Federal plaintiffs had, previous to the Federal suit, unsuccessfully sought in State court to remove the restraint against them shortly after its *ex parte* issuance? 2

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FRANK W. SNEPP, THOMAS F. MOORE, JR., DONALD W. STAHL, AND ALL PERSONS IN STAHL'S EMPLOY, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review a Judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Opinion and Preliminary Injunction of the District Court, rendered November 15, 1972, 350 F. Supp. 1134 (W. D. N. C., 1972), is appended at A., 19.

The opinion of the Court of Appeals, rendered January 26, 1973, 472 F. (2d) 769 (C. A. 4, 1973), is appended at A., 36.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit (A., 47), sought to be here reviewed, was entered on January 26, 1973.

There was no petition for rehearing, nor petition for extension of time within which to petition for certiorari.

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals was correct in reversing, for want of sufficient evidence that "the State proceeding cannot eliminate the threat to the plaintiffs' rights", a Federal District Court Preliminary Injunction against that part of a State Court *ex parte* Injunction which prohibited the Federal plaintiffs, adult organizers of student chapters of the National Association for the Advancement of Colored People, from going onto public school premises without "permission from school authorities", the Federal plaintiffs having unsuccessfully sought in State court to remove the restraint against them shortly after its issuance?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Constitutional Provisions:

(a) United States Constitution, First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

(b) United States Constitution, Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

(c) United States Constitution, Fifth Amendment:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

(d) United States Constitution, Fourteenth Amendment:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes:

(a) 28 United States Code § 1343(3)(4) [ch. 85, pp. 202-03]:

§ 1343. **Civil rights and elective franchise.**—The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) 28 United States Code § 2201 [ch. 151, pp. 412-13]:

§ 2201. **Creation of remedy.**—In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(c) 28 United States Code § 2202 [ch. 151, p. 645]:

§ 2202. **Further relief.**—Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

(d) 42 United States Code § 1983 [ch. 21, p. 201]:

§ 1983. **Civil action for deprivation of rights.**—Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States

or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(e) North Carolina General Statute 7A-32(b)(c) [vol. 1B, pp. 90-91]:

§ 7A-32. Power of Supreme Court and Court of Appeals to issue remedial writs.—

(b) The Supreme Court has jurisdiction, exercisable by one justice or by such number of justices as the court may by rule provide, to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction or in exercise of its general power to supervise and control the proceedings of any of the other courts of the General Court of Justice. The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law.

(c) The Court of Appeals has jurisdiction, exercisable by one judge or by such number of judges as the Supreme Court may by rule provide, to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice, and of the Utilities Commission and the Industrial Commission. The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law.

(f) North Carolina General Statute § 1-269 [vol. 1A, p. 284]:

§ 1-269. Certiorari, recordari, and supersedeas.—Writs of certiorari, recordari, and supersedeas are authorized as heretofore in use. The writs of certiorari and recordari, when used as substitutes for an appeal, may issue when ordered upon the applicant filing a written undertaking for the costs only; but the supersedeas, to suspend execution, shall not issue until an undertaking is filed or a deposit made to secure the judgment sought to be vacated, as in cases of appeal where execution is stayed.

Rules:

(a) Rule 34, Rules of the Supreme Court of North Carolina [N. C. G. S. vol. 4A, p. 228]:

34. Certiorari

(1) When Applied for.—Generally, the writ of certiorari, as a substitute for an appeal, must be applied for at the term of this Court to which the appeal ought to have been taken, or, if no appeal lay, then before or to the term of this Court next after the judgment complained of was entered in the Superior Court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

(2) How Applied for.—The writs of certiorari and supersedeas shall be granted only upon petition, specifying the grounds of application therefor, except when a diminution of the record shall be suggested and it appears upon the face of the record that it is manifestly defective, in which case the writ of certiorari may be allowed, upon motion in writing. In all other cases the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit, and such other evidence as may be pertinent.

(3) Notice of.—No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days' notice, in writing, of the same; but the Court may, for just cause shown, shorten the time for such notice.

STATEMENT OF THE CASE

On October 27, 1972, the Respondent Moore, Solicitor of Mecklenburg County, North Carolina, filed in the Superior Court of Mecklenburg County, North Carolina a 1¼ page Petition (A., 55), alleging that "fighting, boisterousness, disorderly conduct [and] breaching of the peace" had occurred on October 26 and 27, 1972, at East Mecklenburg High School [one of the 106 schools under the jurisdiction of the Charlotte-Mecklenburg Board of Education, Mecklenburg County, North Carolina], and that the Solicitor was informed and believed that "a state of emergency exists or is imminent within the several schools of the Charlotte-Mecklenburg School System" (A., 55). The Petition prayed for "injunctive relief directed against any and all persons who would disrupt the peace, dignity and good order of the schools within the Charlotte-Mecklenburg School System". No summons was ever issued in the case. Simultaneously with the filing of this Petition, the defendant Snepp, a Judge of the Superior Court, issued *ex parte* the "Injunction" (A., 57) against Defendants "John Doe, Richard Roe and all others of like class and situation", forbidding, in relevant part, entry upon the buildings and grounds of any public school in the county and any street adjacent thereto by any except students, staff, law enforcement officers, parents of students transporting students to and from school, and "those having permission from the school authorities and having business with the public schools". Notice was given in the "In-

junction" that the defendants, John Doe, *et al.* were to appear three days thence (the following Monday), to show cause why the restraint should not be continued until a final determination of the proceeding.

Petitioners, Kelly Alexander, Jr. and Robert Steele, adult organizers of student chapters of the National Association for the Advancement of Colored People (NAACP) [Petitioner Alexander is also a member of the Board of Directors of the NAACP], appeared at the scheduled time and place and contested the subject matter jurisdiction of the Court and the constitutionality of the injunction.[1] A hearing was held and resulted in the "Order" (A., 60.) issued by the Superior Court the next day, wherein the Court found as a fact: that [Petitioners] Alexander and Steele were in the class designated as defendants; that on October 24, 26 and 27, 1972, fights at East Mecklenburg High School had substantially disrupted the decreed school routine and caused increased absenteeism; that "during the immediately preceding school year it was the experience that when disturbances began at one school they were shortly followed by disturbances at other schools" (A., 60); that "the Court takes judicial notice of the fact that the disturbances at East Mecklenburg High School occurred shortly after there was widespread coverage in the news media in the area of disturbances in Buncombe County, North Carolina" [some 120 miles west of Mecklenburg County] (A., 60); and that "because of the disturbances at East Mecklenburg High School, which have received extensive coverage in the local news media, and based upon the pattern of previous school disturbances in

[1] An appeal to the Court of Appeals of North Carolina raising the issue of the subject matter jurisdiction of the Superior Court was docketed in the Court of Appeals of North Carolina on March 14, 1973. Petition for Certiorari in the Supreme Court of North Carolina before decision in the Court of Appeals of North Carolina was filed on March 15, 1973, and denied April 2, 1973.

Mecklenburg County, there exists a strong possibility that disturbances will spread to other schools of the system" (A., 60). The prohibitions of "Order" substantially tracked those of the "Injunction", except that their effect was limited to the 31 junior and senior high schools in the system and the prohibition regarding adjacent streets was deleted. There was no finding of disruption at other schools in the system, nor any finding that Petitioners in any way contributed to any disruption.

Later that day Petitioners filed the present action in the United States District Court for the Western District of North Carolina, pursuant to 28 U. S. C. 1343(3)(4), 28 U. S. C. 2201, 2202, and 42 U. S. C. 1983, seeking declaratory, and preliminary and permanent injunctive, relief against the State Court Judge and Solicitor and the local Sheriff, on the grounds that the Orders of the Superior Court violated their rights under the First, Fifth and Fourteenth Amendments to the United States Constitution. After an evidentiary hearing, the District Court preliminarily enjoined enforcement of the Superior Court's ban against visiting schools without "permission", finding that plaintiffs would probably prevail against that aspect of the "Order" on First Amendment and due process grounds.

Pending appeal, a single Judge of the Fourth Circuit stayed the District Court's Order insofar as it affected East Mecklenburg High School; and after expedited appeal a panel of the Fourth Circuit reversed the District Court on grounds of "comity". The merits of the controversy were not reached. The Court of Appeals standard of comity was that "a District Court . . . cannot enjoin a State civil proceeding unless he finds that the State proceeding cannot eliminate the threat to the plaintiff's rights" (A., 44).

The Fourth Circuit read the facts as being shy of this standard.

Petitioners now seek certiorari in this Court to review the Judgment of the Court of Appeals.

REASONS FOR ALLOWING THE WRIT

The opinion of the Fourth Circuit Court of Appeals is in conflict with a prior opinion of the Fifth Circuit, *Machesky v. Bizzell*, 414 F. (2d) 283 (C. A. 5, 1969); and the matter at issue is an important question of federal law which should be, but has not been, settled by this Court. The question presented was expressly left open in *Mitchum v. Foster*, 407 U. S. 225, 243 (1972).[2]

The Court of Appeals first held that to obtain an injunction against a state civil proceeding, a litigant must show the same irreparable harm and lack of adequate remedy at law required for an injunction against a state criminal proceeding, see *Younger v. Harris*, 401 U. S. 37, 43-44 (1971). Further paralleling *Younger*, the Court of Appeals held that the claimed harm must be "both great and immediate, and . . . such that it cannot be eliminated by . . . defense of the single civil action. *Younger*, at 46." (A., 44). The Court then immediately concluded that no injunction could issue without a finding "that the state proceeding **cannot** eliminate the threat to the plaintiff's rights". (A., 44) (Emphasis supplied.) Having followed

[2] Cases dealing with aspects of the question presented include: *Duke v. Texas*, 327 F. Supp. 1218 (E. D. Tex., 1971) (state court injunction colorably restraining First Amendment activity, state court judge explicitly refused to pass on constitutional questions, federal injunction granted); see also *McCue v. Racine*, 330 F. Supp. 466 (E. D. Wisc., 1971); *Palaio v. McAuliffe*, 466 F. (2d) 1230 (C. A. 5, 1972), (state court civil film suppression proceeding, integrally intertwined with pending state criminal proceeding, *Younger v. Harris* applied, federal court refused to intervene); *Wulp v. Corcoran*, 454 F. (2d) 826 (C. A. 1, 1972) (city ordinance colorably restraining First Amendment activity, threats of prosecution, federal equitable intervention allowed; and *California v. Larue*, ... U. S. ...., 34 L. Ed. (2d) 342 (1972) (state agency regulations colorably restraining First Amendment activity, prosecutions threatened, federal equitable intervention allowed without discussion of equity).

Younger without deviation to its conclusion, they there balked at allowing injunction against "bad faith" or obviously unconstitutional state proceedings, and formulated a standard arguably impossible to meet, since there always exists the possibility that some state court will give plaintiffs relief in the state proceeding at some undetermined future time.

The Fourth Circuit required greater, not lesser, reluctance to intervene in civil than in criminal cases—the opposite of the established rule, see *Younger v. Harris, supra,* 401 U. S. at 55, n. 2 (separate opinion of Mr. Justice Stewart, joined by Mr. Justice Harlan). The Fourth Circuit also explicitly refused to mark out a less stringent standard for federal intervention when First Amendment rights are involved. In so doing, the Court recognized that its decision conflicted with *Machesky v. Bizzell, supra,* 414 F. (2d) 283 (C. A. 5, 1969). The Fourth Circuit requires plaintiffs to suspend exercise of their First Amendment rights until a state appellate court allows their exercise,[3] or else suffer possible imprisonment for contempt,[4]

---

[3] Even if the Record on Appeal to the Court of Appeals of North Carolina could have been made up immediately after the Superior Court's "Order," the appeal would not have been argued in due course until the week of March 26, 1973.

There are no statutes or rules providing for expedited appeal in North Carolina. The North Carolina Appellate Courts have power to issue the prerogative writs of mandamus, certiorari, prohibition and supersedeas, N. C. G. S. 7A-32(b)(c), but only supersedeas may affect a trial court judgment pending appeal. Prohibition has been uniformly denied where there is other remedy. *State v. Inman,* 224 N. C. 531, 31 S. E. (2d) 641 (1944); mandamus is an exercise of original, rather than appellate, jurisdiction, *Young v. Roberts,* 252 N. C. 9, 112 S. E. (2d) 758 (1960); and certiorari is a substitute for an appeal not taken, Rule 34, Rules of the Supreme Court of North Carolina (N. C. G. S. Vol. 4A, p. 228). Supersedeas is governed by N. C. G. S. 1-269.

[4] The collateral bar rule prevents plaintiffs from violating the injunction in reliance on a claim of First Amendment rights. See *Walker v. Birmingham,* 388 U. S. 307 (1967). In North Carolina an injunction may be disobeyed only if issued without subject matter jurisdiction, *Freight Carriers v. Teamsters,* 11 N. C. App. 159 (1971), and 43 C. J. S., "Injunctions", Sec. 259, p. 1007, cited therein; otherwise, violation of a voidable, or unconstitutional, injunction may not be excused. *Green v. Griffin,* 95 N. C. 50 (1886); *Massengill v. Lee,* 228 N. C. 35 (1947).

even though plaintiffs dutifully seek to have the state trial court remove the restraint on them and the restraint is clearly probably unconstitutional.[5]

Constitutional rights are, of course, often suppressed until litigation winds it way to this Court. See, *e. g., Stefanelli v. Menard,* 343 U. S. 117 (1951) (Fourth Amendment rights). When a state is engaged in the administration of its criminal laws, federal plaintiffs must show gross lack of regularity before they may interrupt the state process in the name of individual constitutional rights. *Younger v. Harris, supra,* 401 U. S. 37 (1971). In a civil case, however, the state is not normally so closely engaged in the administration of public order. The injunctive relief given by the State court in this particular case aims at the administration of public order, but it is nevertheless not part of a criminal proceeding seeking to punish past conduct. Therefore the immediacy of the threat to the critical state interest of maintenance of public order is less. Plaintiffs say that in such a situation the standard for federal interference should be less stringent, and should take account of the public and perishable nature of First Amendment rights.

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[5] The merits of the underlying dispute are not presented by this petition, but petitioners set forth their contentions on the merits briefly at this point, to support the claim of probable unconstitutionality.

(1) The "injunction" was unconstitutionally issued, for lack of notice and hearing, *Carroll v. Princess Anne,* 175 U. S. 175 (1968); *Rosen v. North Carolina,* 345 F. Supp. 1364 (W. D. N. C., 1972).

(2) The Superior Court orders are overbroad, being issued to the general public, for an indefinite duration, and regarding schools not affected by violence, see *Shelton v. Tucker,* 364 U. S. 479 (1960).

(3) The Superior Court orders violate the First Amendment, by the standardless prior restraint of "permission", *Shuttleworth v. Birmingham,* 394 U. S. 147 (1967).

The District Court agreed with petitioners on all these contentions, and additionally expressed doubt that the findings of fact in the Superior Court "Order" were substantial enough to support, as a matter of due process, the injunctive orders issued (A., 28).

Petitioners agree with the Fourth Circuit that the scope of comity derives from analysis of competing interests, rather than from labels of "civil" or "criminal" (A., 42). Plaintiffs argue, however, that the Fourth Circuit formulation of the applicable standard is untenable, for effectively making Sec. 1983 impossible of application to suits for injunction against state judicial action. This result defeats the purpose of Sec. 1983, as expressed in *Ex Parte Virginia,* 100 U. S. 339, 346 (1880), which is to enforce the Fourteenth Amendment "against state action . . . whether that action be executive, legislative, **or judicial**" (emphasis suppled by *Mitchum v. Foster,* 407 U. S. 225, 240 (1972)). Petitioners argue that, when First Amendment rights are infringed and not restored upon timely application to the state court, persons affected thereby are entitled to proceed to secure an injunction in federal court under Sec. 1983. Comity cases involve sharp clashes of judicial systems and personalities, and clashes of court orders tend to erode the image of the law as stable. Further, a state court is likely to highly resent being told its error by a court of mere parallel authority. Plaintiffs say that, nevertheless, First Amendment rights must not await vindication on appeal. First Amendment rights are fundamentally different from, for example, Fourth or Fifth Amendment rights, in an aspect critical to the present issue. A Fourth or Fifth Amendment right is generally personal to the person asserting it, and the most immediate effect of its denial at trial may be substantially mitigated pending appeal—as, by an appearance bond or other form of release pending review of the claim of error. First Amendment rights, however, are public rights—for example, the right to communicate **with others**, the right to assemble **with others**—and in such cases as here presented their suppression was not stayed in the court which accom-

plished the error, nor may the effect of their suppression be stayed pending appeal by any ordinarily available process.

In the double-edged words of Justice Brennan, First Amendment rights are the rights of "governing importance", Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment", 79 Harv. L. Rev. 1, 12-13. First Amendment rights are public, political swords. Injury to First Amendment rights, not corrected upon timely application to the court causing the injury, is equivalent to a "threat to . . . federally protected rights . . . that cannot be eliminated by . . . defense against a single" civil action, *Younger v. Harris, supra,* 401 U. S. 37, 46 (1971). The distinction between the type of rights involved merits a difference in the standard to be applied when a federal injunction is sought. *Machesky v. Bizzell, supra,* 414 F. (2d) 283 (C. A. 5, 1969). The central question is whether one has an adequate remedy at law and is suffering irreparable harm. The perishable nature of First Amendment rights demands that collateral relief be available when the state trial court refuses to honor them. Cf., *Appalachian Volunteers v. Clark,* 432 F. (2d) 530, 537-38 (C. A. 6, 1970). Further than this, deference to state court judges allows their notions, rather than clear First Amendment law, to be the actuality. Their injury is irreparable when not speedily remedied. *Cf., King v. Jones,* 450 F. (2d) 478, 479 (C. A. 6, 1971).[6]

[6] For a humorous view of the legal issues presented by this Petition, we have attached at A., 48 a set of occasional papers that developed out of this litigation.

CONCLUSION

WHEREFORE, petitioners pray that this Petition for Writ of Certiorari be granted and the judgment of the United States Court of Appeals for the Fourth Circuit be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that I have this day personally deposited three copies of the foregoing Petition for Writ of Certiorari into the United States Post Office at Charlotte, North Carolina, first class postage prepaid, addressed to:

Mr. CHARLES A. LLOYD
Asst. Attorney General of North Carolina
P. O. Box 629
Raleigh, North Carolina

Counsel for the Respondents. I further certify that Raleigh, North Carolina is less than 500 miles from Charlotte, North Carolina, and that I am a member of the bar of the Supreme Court of the United States. All parties required to be served have been served.

This 20 day of April, 1973.

GEORGE S. DALY, JR.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
C-C-72-252

Filed November 15, 1972

J. TOLIVER DAVIS,
Clerk, U. S. District Court, W. Dist. of N. C.

PHYLLIS LYNCH, KELLY M. ALEXANDER, JR., ROBERT STEELE AND FLEDORA GRIER, PLAINTIFFS,

versus

FRANK W. SNEPP, THOMAS F. MOORE, JR., DONALD W. STAHL, AND ALL PERSONS IN STAHL'S EMPLOY, DEFENDANTS.

MEMORANDUM OF DECISION AND PRELIMINARY INJUNCTION

George S. Daly, Jr., 700 Law Building, Charlotte, North Carolina 28202, counsel for plaintiffs.

Charles A. Lloyd, Assistant Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina, counsel for defendants.

Before James B. McMillan, District Judge

THE FACTS

On October 27, 1972, the defendant, Judge Frank W. Snepp, resident North Carolina Superior Court Judge, *ex parte* and without notice, and based solely upon a one and one-fourth-page petition signed by the district prosecuting attorney, entered an injunction against "John Doe, Richard Roe and all others of like situation." It forbade disorders and various crimes and misdemeanors on or near

any of the public school properties of Mecklenburg County, and it forbade the John Doe defendants, pending further orders of court:

> "From going in the buildings or on the grounds of any public school or any administrative offices of the public schools or any property of the Charlotte-Mecklenburg Board of Education within the Charlotte-Mecklenburg School District, or on any street adjacent thereto and from going in the vicinity thereof with the following exceptions to this numbered paragraph:
>
> (a) Students at the said schools who are attending classes or other regularly scheduled activities;
>
> (b) Teachers, principals, staff and employees of the schools while in attendance to their regular and lawful duties;
>
> (c) Those having permission from the school authorities and having business with the public schools;
>
> (d) Law enforcement officers and public officials while in attendance to their regular and lawful duties;
>
> (e) Parents or guardians of students attending the school while transporting those students to and from those schools."

The order notified the "defendants" to appear on October 30, 1972, and show cause, if any, why the order should not be continued in effect until final determination of the action.

No action was pending when the injunction was issued; no summons had been issued to anyone and none had been issued when this matter was heard by this court on November 3, 1972.

There is no evidence that school authorities sought, encouraged or advised the injunction.

Phyllis Lynch, Kelly M. Alexander, Jr., Robert Steele and Fledora Grier, plaintiffs in this case, appeared before Judge Snepp on October 30, 1972, and became parties and sought to obtain a reversal of the October 27 order. They

were successful in some particulars. The seventy-three elementary schools in the county were eliminated, leaving ten high schools and about twenty junior high schools scattered over a twelve-mile radius still subject to the order. In certain further though minor particulars the order was changed. The prohibition against being in the streets adjacent to the schools was eliminated. However, the prohibition against being on school property without "permission" was kept in effect and the persons authorized to give permission were limited to "administrative officers of the Charlotte-Mecklenburg Board of Education or [from] school principals."

Plaintiffs on October 31, 1972, the day the amended order was filed, brought this action seeking injunctive relief against enforcement of the order and a declaration of its unconstitutionality as an illegal prior restraint upon freedom of speech and freedom of assembly under the First Amendment to the United States Constitution and as violating the due process and equal protection clauses of the Fourteenth Amendment. Bad faith in the solicitor's petition and in the injunction and the order was alleged. A hearing after due notice was conducted on November 3, 1972. None of the defendants appeared, but they were represented by Mr. Charles A. Lloyd, Assistant Attorney General of North Carolina.

All the schools involved are in the Charlotte-Mecklenburg school system, whose operations have been and are the subject of continuing litigation in this court. (See *Swann v. Charlotte-Mecklenburg Board of Education,* Civil Action No. 1974. See also *Givens v. Poe, et al.,* Civil No. 2615, in which the subject of discipline within the schools has been the subject of extended litigation and in which an order was entered on November 1, 1972, approving a new set of rules providing due process for students involved in disciplinary proceedings.)

FACTS BEARING ON STANDING—THE RIGHT OF THESE PARTICULAR PLAINTIFFS TO CHALLENGE THE INJUNCTION

The only oral testimony at the hearing in this Court was the testimony of Kelly Alexander, Jr., age 24, and Robert Steele, two of the plaintiffs. Alexander and Steele are black citizens who are interested in organizing and coordinating activities of the NAACP, both having official positions as coordinators of youth affairs. These coordinators have arrangements with student monitors in the schools who provide information on instances of violation of due process, racial discrimination and other student rights violations. Because of reports that black students were being discriminated against in the realm of suspensions from bus privileges and other school activities, Alexander and Steele started a "dialogue" with some of the principals. As illustration of this dialogue Alexander on October 13, 1972, wrote a letter to the principal of East High School. In that letter Alexander sought a conference with the principal to discuss among other things the school's alleged action in denying a student the opportunity to distribute literature at school and in refusing to allow a black students' club to be formed without advance accumulation of over two hundred signatures and approval by the student congress.

The principal had a conference with Alexander and Steele on October 26, 1972, at 4:00 P. M. It produced no change in the official attitude. It produced, plaintiffs say, comments comparing the plaintiffs' activities with those of the Ku Klux Klan. Plaintiffs say they were advised that none of their literature could be distributed except through a student club; that literature for the purpose of organizing the club could not be distributed because it was not being distributed by a club; and that NAACP literature could not be distributed unless ordered by the school superintendent or by a court. The principal had, however, allowed a student to circulate an organization petition, and more than the required two hundred signatures had been accumulated.

The meeting ended in an apparent stalemate; no agreement was reached.

The principal reportedly indicated that there had been some disorder at the school that day (October 26), but "no major disruption"; and there was no disorder while Steele and Alexander were at the school.

Plaintiffs say that they have not visited many schools, but that they would like to be free to talk with students at lunch periods and before and after school and at other free times. They indicated that they desire to inform students about the new due process rules of discipline and about student rights on other matters.

Following the October 31, 1972, injunction, Robert Steele wrote to the high school monitors a memorandum summarizing the efforts that had been made in September and October and the problems that had been encountered, specifically, denial of permission to circulate literature at East, South and West High Schools, expulsion of students from school busses for long periods without hearing and with detrimental effect upon ability to do school work, and the other matters mentioned above. The memorandum warned the monitors against any demonstrations or violence, warned them to comply with the injunction, and advised that student complaints be channelled through parents while the injunction was in effect.

Because of the injunction plaintiffs have been forced to discontinue their work with the schools and the administrative staff. They have not sought permission under the order to visit the schools, but, apprehensive that any visit might be made the occasion for misunderstanding and possible punitive action, have stayed away. They appeared and contested the order at their earliest opportunity—on October 30, 1972.

This evidence concerning the persons who filed this particular suit is of relevance primarily on the question of "standing"—whether these plaintiffs stand to gain or lose because of the injunction and therefore whether they have the right to bring the suit.

JURISDICTION

Article VI of the United States Constitution provides that:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; **and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.**" (Emphasis added.)

The First Amendment to the United States Constitution, the "supreme law of the land," provides that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment provides, in pertinent part:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Civil Rights Act of 1871 (42 U. S. C., § 1983) provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

State judges are not immune from injunction, under the Civil Rights Act of 1871, against improper use of judicial authority in violation of the civil rights of citizens.

Littleton v. Berbling, 41 L. W. 2215-2216 (7th Cir., October 6, 1972); *Mitchum v. Foster,* 407 U. S. 225 (1972).

Court orders [*Austin v. Keefe,* 402 U. S. 415 (1971)], as well as legislation [*Cox v. Louisiana,* 379 U. S. 536 (1964)], must conform to the requirements of the Bill of Rights; judges, like lawmakers, must respect the United States Constitution.

Title 28 U. S. C., § 2283 provides that:

> "A court of the United States may not grant an injunction to stay proceedings in a State court **except as expressly authorized by Act of Congress,** or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." (Emphasis added.)

Section 2283 does not bar the suit; in *Mitchum v. Foster,* 407 U. S. 225 (1972) the Supreme Court held that suits under Section 1983, the Civil Rights Act, are "expressly authorized by Act of Congress" within the exception in Section 2283.

Defendants say that plaintiffs lack standing; that there is no "case or controversy" before the court; that plaintiffs have not exhausted administrative remedies; that the court should abstain from decision pending appeal; that plaintiffs are unlikely to win on the merits; and that plaintiffs have not shown irreparable harm.

The sworn allegations and the evidence show harm that is great, irreparable and immediate. There is no likelihood that one-at-a-time damage suits after plaintiffs have run the risks and expense of criminal prosecution would be likely to protect the rights of speech and assembly which are indefinitely suspended by the order. One whose First Amendment right of free speech is suppressed should not be relegated to the role of a criminal defendant in order to get a ruling on the validity of that suppression. Bad faith is alleged. The history of declaratory judgment is such that without violating the injunction and undergoing a criminal prosecution it is doubtful that plaintiffs could get a North Carolina court to review the order on its merits. Plaintiffs have made a showing of substantial probability that they will prevail in a final hearing on the

merits. Plaintiffs will not be required to exhaust administrative remedies by seeking permission to do what they have already been told they will not be allowed to do. Granting of "permission" after litigation arose is no proof that permission would have been granted before the suit was started—or that it will be granted, after. The plaintiffs, who have already been denied the rights sought by this suit, and who have intervened and resisted the issuance of the second order, do have standing to raise the constitutional issues. *Walker v. Birmingham,* 388 U. S. 307, 318. Plaintiffs have been inhibited and restrained by the order; they have no remedy at law; and they are entitled to present these issues for decision.

"Our federalism" (*Younger v. Harris,* 401 U. S. 37 (1971)) provides a dual system of state and federal servants. Comity, a judicial doctrine, contemplates that federal and state courts respect each other's opinions and problems. This minimizes conflicts. It is everyday courtesy. The United States Constitution, the supreme law of the land, values human freedom more than judicial courtesy, and require that **all** state and federal judges respect the Bill of Rights, including rights of free speech and expression. Abstention, comity, and federalism are not valid reasons, on this record, for shirking this court's duty to investigate and protect against the alleged serious threats to constitutional freedom. The case should be decided on its merits.

DUE PROCESS

The original injunction created, *ex parte* and without notice, a special local crime of unauthorized presence on Mecklenburg County school property, with summary punishment, without a jury, by way of contempt, as the penalty. Under North Carolina statutes and procedure, an injunction is not a cause of action or a lawsuit in and of itself, but is a remedy which is ancillary to a pending suit. Since no complaint or summons had been filed, no action had been instituted and there was no pending action to which the injunction could be ancillary. See North Carolina General Statutes, § 1-485 and Rule 3, North Carolina Rules of Civil Procedure. In *Freight Carriers v. Team-*

sters, 11 N. C. App. 159 [N. C. Ct. of Appeals 1971; *cert. den.,* 278 N. C. 701 (1971)], the North Carolina Court of Appeals held void an injunction based on an affidavit, without prior filing of complaint or issuance of a summons; and contempt citations based on the injunction were set aside. The irregularity in the procedure is not excused by N. C. G. S., § 14-288.18, which expressly deals with procedures for getting injunctions during school emergencies. That statute does not appear to justify what was done here, because the persons authorized to bring suit under that statute are school officials, **not** the criminal prosecutor. The original order, so far as the record shows, was based purely upon the brief petition of the district solicitor, alleging in substance that persons unknown by name to him, students and non-students, had engaged in fighting and other disorderly conduct at East High School on October 26 and October 27, and that he was informed and believed that disorder was imminent at other high schools. It appears most doubtful that the supporting petition or the original order itself recites enough fact to support the injunction, even if the proper procedures for this extraordinary remedy had been followed.

Since no notice was given anyone of the original (October 27, 1972) injunction, it was void under well known due process principles. *Carroll v. Princess Anne,* 393 U. S. 175 (1965) (injunction against Ku Klux rally held invalid for lack of notice and opportunity to be heard before its issuance); *Rosen v. North Carolina,* Civil Action No. C-C-72-148 (W. D. N. C., July 12, 1972).

The second order was issued at 9:00 A. M. on October 31, 1972, following a hearing on October 30, 1972. At the October 30 hearing, pursuant to the notice, the burden was upon petitioners to show cause why the original injunction should not be continued in effect.

The findings of fact preceding the October 31, 1972, order are in somewhat greater detail than the conclusions in the first order, though they still relate mainly to the same incidents at East High School on October 26 and 27, 1972, and they are supplemented by rumors that persons unknown had weapons in automobiles; that disturbances

at other schools had been reported; that "at least one participant" in the disturbance at East High School was not a student enrolled there; that such disturbances tend to spread from school to school and that disturbances in Mecklenburg (and in Buncombe County, a hundred and twenty miles west) have been reported through press and broadcasting media. There is a serious question whether as a matter of substance the findings support the order. The weakness of the findings and the lack of initial procedural safeguards are coupled with the placing of the burden on the defendants to show why their First Amendment rights should not continue to be suspended. It appears extremely doubtful that even the second injunction can stand as a matter of due process.

FIRST AND FOURTEENTH AMENDMENT VIOLATIONS OF FREE SPEECH AND EQUAL PROTECTION

Paragraph 2(c) of the amended order forbids plaintiffs and others to be present on the premises of ten senior high schools and about twenty junior high schools without "permission from the administrative officers of the Charlotte-Mecklenburg Board of Education or from school principals."

This is a prior restraint upon the exercise of First Amendment rights.

The restraint is wide open, unqualified, and totally discretionary with the school principals and other administrative officials. No standard or purpose, public or otherwise, is laid down to guide the school authorities in granting or denying permission.

The authority to give permission for no reason is the authority to refuse permission for no reason—or for a reason which denies constitutional or other rights.

The authority to give or withhold "permission" is also the authority to discriminate among applicants and thereby to deprive applicants of equal protection of laws under the Fourteenth Amendment; the authority in charge could admit women and exclude men; he could admit blacks and

exclude whites or vice versa; he could allow an organizer from the Drug Education Center or the American Legion, but not from the WCTU or the Veterans of Foreign Wars.

In *Carroll v. Princess Anne,* 175 U. S. 175 (1968), the Supreme Court, noting that elimination of prior restraints upon free speech was a "leading purpose" in the adoption of the First Amendment, said (at pages 180-181):

> "There is a place in our jurisprudence for *ex parte* issuance, without notice, of temporary restraining orders **of short duration**; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.
>
> "We do not here challenge the principle that there are special, limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guarantee of the First Amendment. In *Cantrell v. Connecticut,* 310 U. S. 296, at 308 (1940), this Court said that '[n]o one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot.' See also *Chaplinsky v. New Hampshire,* 315 U. S. 568, 572 (1942); *Milk Wagon Drivers Union v. Meadowmoor Dairies,* 312 U. S. 287, 294 (1941). **Ordinarily, the State's constitutionally permissible interests are adequately served by criminal penalties imposed after freedom to speak has been so grossly abused that its immunity is breached.** The impact and consequences of subsequent punishment for such abuse are materially different from those of prior restraint. **Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment.**
>
> "The Court has emphasized that '[a] **system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.**' *Bantam Books v. Sullivan,* 372 U. S. 58, 70 (1963); *Freedman v. Maryland,* 380 U. S. 51, 57 (1965).

> And even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit. As the Court said in *Freedman v. Maryland, supra,* at 58, a noncriminal process of prior restraints upon expression 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'" (Emphasis added.)

The order, even in its amended form, flatly prohibits plaintiffs and others from visiting any of the ten high schools or the twenty junior high schools in Mecklenburg County without "permission" from school officials. Poll holders, we read, inquired whether the order prohibited them from going on school property to man the polls on November 7, election day. This is simply one illustration of the overbreadth and overreach of the order. It is indefinite as to time and remains in effect "pending further orders of this court." It covers more ground than any legitimate state interest could support; the described disorders at East High School and the rumors of disturbance at "other schools" and in Buncombe County would appear to be no basis for depriving plaintiffs and others, who were peaceable and who produced no disorder, from visiting the other twenty-nine schools peaceably in the exercise of constitutional rights of free expression. The order gives unrestricted discretion to school officials to give or deny permission. No standards of any kind are advanced or specified. It has simply been made a local crime, beyond the reach of jury trial, to visit a school except with the blessing of some school authority.

The General Assembly of North Carolina already has placed on the books one law (G. S., § 14-273) prohibiting willful or intentional school disruptions or disturbances. The limiting concept of willfulness or intention—the criminal intent so usually an element in criminal statutes—is totally missing from the order, which makes one subject to contempt even if the unpermitted visit is unintended!

The Supreme Court said in *Shuttlesworth v. Birmingham*, 394 U. S. 147, 150-151 (1969):

> ". . . A law subjecting the exercise of First Amendment freedoms to the prior restraint of a license without **narrow, objective** and **definite standards** to guide the licensing authority is unconstitutional." (Emphasis added.)

In *Cox v. Louisiana*, 379 U. S. 536, 557-558 (1965) the Court said:

> "This Court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor. See *Saia v. New York, supra* [334 U. S. 558 (1948)], at 562. Also inherent in such a system allowing parades or meetings only with the **prior permission** of an official **is the obvious danger to the right of a person or group not to be denied equal protection of the laws.** See *Niemotko v. Maryland, supra* [340 U. S. 268 (1951)], at 272, 284; *Cf. Yick Wo v. Hopkins*, 118 U. S. 356. It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.
>
> "It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is 'exercised with "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination" . . . [and

with] a "systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways . . ." ' *Cox v. New Hampshire, supra* [312 U. S. 569 (1941)].

"But here it is clear that the practice in Baton Rouge allowing **unfettered discretion** in local officials in the regulation of the **use of the streets** for peaceful parades and meetings is an **unwarranted abridgment** of appellant's **freedom of speech and assembly** secured to him by the First Amendment, as applied to the States by the Fourteenth Amendment. It follows, therefore, that appellant's conviction for violating the statute as so applied and enforced must be reversed." (Emphasis added.)

And in *Austin v. Keefe,* 402 U. S. 415, 419 (1971), the Court reminds us that "**so long as the means are peaceful, the communication need not meet standards of acceptability.**" (Emphasis added.)

A WORD ABOUT THE AUTHORITY OF SCHOOL PRINCIPALS

The order which follows does not reduce in any manner the lawful authority of school principals to maintain order and discipline; to require that education be the prime business of the students; to deal promptly under the new school discipline rules with students who require correction; and to call upon law enforcement authorities for aid in case of riot, disruption of school proceedings, criminal trespass and other violations of criminal law.

The principal is still in charge of his school.

Campus visitors must remain peaceful and obey the laws.

Disorder and crisis can still be dealt with, under the adequate criminal laws of North Carolina, without the threat to constitutional freedom created by the state court injunction.

ORDER

The restriction on visiting school property imposed by the Superior Court injunctions of October 27 and October 31, 1972, on this showing, violate the constitutional rights of plaintiffs and others to free speech and assembly and petition, to due process of law, and to equal protection of laws. Pending final decision on the merits, defendants and all other officers, servants, agents and officials who do or may do their bidding and all who were authorized or consider themselves to be authorized by those orders are restrained from taking any further action of any kind to enforce paragraph three of the Superior Court order of October 27, 1972, and paragraph two of the Superior Court order of October 31, 1972.

This 15th day of November, 1972.

/s/ JAMES B. McMILLAN,
United States District Judge.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-2377

FRANK W. SNEPP AND THOMAS F. MOORE, JR.,
APPELLANTS,

versus

PHYLLIS LYNCH, KELLY M. ALEXANDER, JR.,
ROBERT STEELE AND FLEDORA GRIER, APPELLEES

Filed November 24, 1972

ORDER STAYING IN PART THE PRELIMINARY INJUNCTION PENDING APPEAL AND ACCELERATING THE APPEAL

This is a Motion under Rule 8 of the Rules of Appellate Procedures for Stay of Injunction issued by the United States District Court for the Western District of North Carolina. I find it impracticable within the meaning of the rule to convene a panel or division of the court and, therefore, act upon the Motion as a single circuit judge. The district judge has denied a Motion to Stay this Preliminary Injunction.

In his injunctive order of November 15, 1972, the appellants were restrained from "taking any further action of any kind to enforce Paragraph 3 of the Superior Court Order of October 27, 1972, and Paragraph 2 of the Superior Court Order of October 31, 1972."

It is important to note what was **not** done by the district judge. He did not undertake to enjoin or otherwise interfere with other portions of the injunction issued by the Superior Court of North Carolina. Thus, left in effect were the commands of that Court preventing the threatening or intimidating of the students in the junior and senior high schools, and preventing interference with the orderly operation of bus transportation, and indeed preventing intimidation of any sort with the intent to interfere with the operation of the Charlotte-Mecklenburg Schools or to discourage attendance.

What the district judge **did** do was intended to prevent enforcement only of that part of the injunction of the Superior Court purporting to prevent these plaintiffs and others from going in the buildings, or on the grounds of any high school or junior high school of the Charlotte-Mecklenburg school system.

One difficulty with the order of the Superior Court is its possible overbreadth. It prevents any and all visits by these plaintiffs and other members of the public to all ten high schools and about twenty junior high schools in the county scattered over a twelve-mile radius. But there is no evidence in the record of disruption or threatened disruption except at East Mecklenburg High School. The firstness of the First Amendment teaches that prior restraint of assembly and speech may be justified only by a showing of clear and present danger, *i. e.*, violence, or the imminent threat of violence. Because this action in the Superior Court was not initiated by school authorities and because school authorities have not joined in the litigation, nor even testified, there is not apparently presented the question of their power and authority to reasonably control exercise of First Amendment rights in the educational environment.

IT IS ORDERED that the Motion before me to stay the injunction issued by Judge McMillan is denied in part and granted in part. In so far as Judge McMillan's Order invalidates the state court injunction with respect to East Mecklenburg High School, it is stayed. The effect is to reinstate, pending appeal, Judge Snepp's Order with respect to East Mecklenburg High School, but not with respect to the other nine high schools and some twenty junior high schools.

I do not read Judge McMillan's Order as preventing school authorities from maintaining order and discipline and otherwise assuring that there will not be disruption and disorder in the public schools of the Charlotte-Mecklenburg school system. Indeed, he has so stated in his own order.

Nothing contained in Judge McMillan's Order and nothing contained in my partial stay order shall be construed to prevent the chief administrative officer or his authorized representative of the Charlotte-Mecklenburg Public School System from applying anew to any Superior Court Judge of the State of North Carolina for injunctive relief if a state of emergency should exist or should be imminent within his institution. Such proceeding is specifically authorized by General Statutes of North Carolina, § 14-288.18. What has transpired thus far in this case will not, in my opinion, affect or invalidate a proceeding under this statute brought by the chief administrative school officer—if he deems it appropriate and necessary to institute such an action.

I have consulted with Chief Judge Haynsworth and we have agreed that as a matter of deference and respect to the co-ordinate courts of the State of North Carolina, and as a matter of comity, this appeal should be accelerated. IT IS ORDERED that the case be set down for hearing on appeal at the next term convening in Richmond on Monday, December 4, 1972.

This the 21st day of November, 1972.

J. BRAXTON CRAVEN, JR.,
United States Circuit Judge.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-2377

PHYLLIS LYNCH, KELLY M. ALEXANDER, JR., ROBERT STEELE AND FLEDORA GRIER, APPELLEES,

versus

FRANK W. SNEPP, THOMAS F. MOORE, JR., RONALD [*sic*] W. STAHL, APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE
JAMES B. MCMILLAN, DISTRICT JUDGE

(Argued December 5, 1972 Decided January 26, 1973.)

Before WINTER, CRAVEN and FIELD, Circuit Judges.

Charles A. Lloyd, Assistant Attorney General of North Carolina. (Robert Morgan, Attorney General of North Carolina, on brief) for Appellants Snepp and Moore; George S. Daly, Jr., for Appellees.

CRAVEN, Circuit Judge:

This is an appeal by judicial and executive officers of the State of North Carolina from the granting of a preliminary injunction against them by the United States

District Judge. The federal preliminary injunction has the effect of restraining in part the enforcement of a state injunction that undertook to control access to the public schools of Mecklenburg County by the public. We are thus confronted with an unfortunate juxtaposition of federal and state judicial power. The state's interest in the matter and the jurisdiction of its courts is predicated upon state police power and the maintenance of peace and the preventing of disruption in the operation of the public schools. The interest of the federal court, equally legitimate, is the vindication and protection of the right of freedom of speech and assembly pursuant to the first amendment. Both co-ordinate courts undoubtedly have subject matter jurisdiction.

The federal court issued its preliminary injunction under the authority of 42 U. S. C., § 1983, which has now been held, *Mitchum v. Foster,* 407 U. S. 225 (1972), to be an express exception by the Congress to the bar of the anti-injunction statute, 28 U. S. C., § 2283.[1]

That the federal court had jurisdiction under 42 U. S. C., § 1983 and was not prevented from exercising it by 28 U. S. C., § 2283 does not end the matter. In *Mitchum, supra,* the Supreme Court, after holding that the anti-injunction statute was not a bar to the maintenance of a § 1983 case, then noted that "we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." 407 U. S. at 243. *Mitchum* referred to *Younger v. Harris* for an exposition and statement of these principles. *Younger* and its companion cases[2] were

[1] It should be noted that the state court injunction did not purport to interfere with the jurisdiction of the federal court in implementing a unitary school system in Charlotte and Mecklenburg County, *see Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U. S. 1 (1971). Thus the district court had no occasion to act, as it surely could, in aid of its jurisdiction, which is another exception contained in the anti-injunction statute.

[2] *Younger v. Harris,* 401 U. S. 37 (1971); *Samuels v. Mackell,* 401 U. S. 66 (1971); *Boyle v. Landry,* 401 U. S. 77 (1971); *Perez v. Ledesma,* 401 U. S. 82 (1971); *Dyson v. Stein,* 401 U. S. 200 (1971); *Byrne v. Karalexis,* 401 U. S. 216 (1971).

decided in the context of enjoining state criminal proceedings. In a concurring opinion in *Mitchum* the Chief Justice noted that the Court has "not yet reached or decided exactly how great a restraint is imposed by these principles on a federal court asked to enjoin state civil proceedings." 407 U. S. at 244.

It is that question we must decide here, *i. e.*, to what extent the general notions of comity, equity and federalism, as exposited in *Younger* and its companion cases, apply in this civil context. The application of these principles must always be considered by federal judges in the course of determining whether or not to exercise jurisdiction to restrain state courts in a suit brought under § 1983. But to say that such principles are germane and applicable does not dictate the result in a given case. For reasons later exposited we think the application of such notions to the facts of this case indicate that the only appropriate course for the district court was to refrain from exercising its equitable jurisdiction. Therefore, we reverse the grant of preliminary injunction.

I

The federal plaintiffs filed this suit against the superior court judge, the solicitor, and the sheriff of Mecklenburg County, North Carolina, challenging, under 42 U. S. C., § 1983, the constitutionality of two orders issued by the North Carolina Superior Court.

On October 27, 1972, the solicitor had presented a sworn petition to the superior court stating that a state of emergency was imminent within the Charlotte-Mecklenburg school system as a result of certain episodes of violence and disruption. In response, the court issued a temporary restraining order, restraining all but students, employees, those with permission from school authorities, law enforcement officials, and parents transporting children to or from school from entering school property. The order gave notice that those wishing to contest the continuance of the injunction could do so by appearing at a show cause hearing to be held three days later.

At least three of the four federal plaintiffs appeared at the show cause hearing and were found to be within the class designated defendants. On October 31, 1972, the superior court issued a preliminary injunction [3] which substantially continued the visitation prohibitions of the restraining order.

Thereafter, the plaintiffs filed their action in the federal district court, challenging the orders of the superior court. The plaintiffs sought a preliminary injunction against the enforcement of the superior court orders. On November 15, 1972, the district court granted a preliminary injunction to the plaintiffs, and the defendants appealed. This court issued an order staying in part the preliminary injunction pending appeal.

II

The long-standing public policy against federal court interference with state court proceedings antedates the Constitution. Goebel, Antecedents and Beginnings to 1801, History of the Supreme Court of the United States, 226, 299 (Freund ed. 1971). This policy is founded in part on "the

[3] The preliminary injunction of October 31, 1972 provided in relevant part:

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED that the persons who have become parties hereto and all persons acting in concert with them, and all persons to whom knowledge of this order may come, are hereby restrained and enjoined as follows:

. . .

2. From going in the buildings or on the grounds of any high school or junior high school which is a unit of the Charlotte-Mecklenburg Board of Education, with the following exceptions:

(a) Students at said schools attending classes or other regularly scheduled activities of the schools.

(b) Teachers, administrative employees, staff members and other employees of the schools, while in attendance to their regular duties.

(c) Persons having permission from the administrative officers of the Charlotte-Mecklenburg Board of Education or from school principals.

(d) Members of the news media.

(e) Law enforcement officers and public officials in the discharge of their duties.

(f) Parents or guardians of students attending the school or other persons transporting students to or from the school when such entry is reasonably necessary for the purpose of such transportation.

basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger v. Harris,* 401 U. S. 37, 43-44 (1971). This equity doctrine is reinforced by the concepts of federalism.

> We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarassing conflicts unless rules were adopted to avoid them.
>
> *Wilson v. Schnettler,* 365 U. S. 381, 385 (1961).

One such rule early adopted by the Court is that:

> Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases.

Taylor v. Taintor, 16 Wall. 366, 370 (1873). See also *Ex parte Young,* 209 U. S. 123, 161-62 (1908). Thus ordinarily the jurisdiction of a state court first obtained should not be interfered with by federal courts. *Ex parte Chetwood,* 165 U. S. 443 (1897); *University Day Care Center, Inc. v. Temple University,* 442 F. (2d) 1116, 1118 (3d Cir. 1971); *Ganger v. Peyton,* 379 F. (2d) 710 (4th Cir. 1967).

Even though federal courts have the admitted power under the Civil Rights Acts to enjoin state proceedings, such power is not to be used to upset federalism and centralize power. *Stefanelli v. Minard,* 342 U. S. 117, 120 (1951). Sensitivity to the interests of two sovereignties require that a federal equity court should enjoin state officers only when absolutely necessary to the protection of constitutional rights, *Fenner v. Boykin,* 271 U. S. 240 (1926), and always with a proper regard for the rightful independence of state governments. *Burford v. Sun Oil Co.,* 319 U. S. 315, 317-18 (1943); *Pennsylvania v. Williams,* 294 U. S. 176, 185 (1935).

In a case seeking to enjoin enforcement of a state civil statute, Mr. Justice Holmes stated:

> [N]o injunction ought to issue against officers of a state clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury.

Massachusetts State Grange v. Benton, 272 U. S. 525, 527 (1926).

Likewise, Mr. Justice Cardozo cautioned that:

> A prudent self restraint is called for . . . if state and national functions are to be maintained in stable equilibrium. Reluctance there has been to use the process of federal courts in restraint of state officials though the rights asserted by the complainants are strictly federal in origin.

Hawks v. Hamill, 288 U. S. 52 (1933).

Maintaining a stable equilibrium between our dual sovereignties is difficult at best. *Erdmann v. Stevens,* 458 F. (2d) 1205, 1212 (2d Cir. 1972). (Lumbard, J., concurring). The interest in protection of constitutional rights pulls in one direction and the interest in preserving the rightful independence of state judiciaries pulls in the opposite direction. Comment, *Federal Court Stays of State Court Proceedings: A Re-examination of Original Congressional Intent,* 38 U. Chi. L. Rev. 612-13 (1971).

> Federalism means
> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger, at 44. Because of this required sensitivity it has been necessary for the Court "to repeat time and time again that the normal thing to do when federal courts are

asked to enjoin pending proceedings in state courts is not to issue such injunctions." *Younger*, at 45.

These general notions of comity, equity, and federalism, applied since the early days of our Union of States and most recently restated in *Younger* and its companion cases,[4] occupy a highly important place in our history and our future. Their application should never be made to turn on such labels as "civil" or "criminal" but rather upon an analysis of the competing interests in each case. *Palaio v. McAuliffe*, 466 F. (2d) 1230, 1232-33 (5th Cir. 1972); *Cousins v. Wigoda*, 463 F. (2d) 603 (7th Cir.), *application for stay denied*, ... U. S. ...., 34 L. Ed. (2d) 15 (1972) (Rhenquist, Circuit Justice).

III

The starting point for an analysis of the competing interests involved has been stated by Mr. Justice Brennan.

> Taken together, the principles of *Ex parte Young* and *Dombrowski* establish that whether a particular case is appropriate for federal intervention depends both on whether a state proceeding is pending and on the ground asserted for intervention.

Perez v. Ledesma, 401 U. S. 82, 120 (1971) (Brennan, J., concurring in part and dissenting in part).

Thus "pendency" of state proceedings is one of the most important criteria in determining whether federal court intervention in state action is appropriate. One of the factors deserving of consideration is expense in terms of both time and money in the prosecution simultaneously of proceedings in coordinate courts. This sort of expense has been urged as a reason for abandoning *Pullman*-type abstention—where a federal court abstains to await state court determination of a state law issue—even though no state court proceeding is pending. *Baggett v. Bullitt*, 377 U. S. 360, 378 (1964); Wright, Law of Federal Courts, 198 (2d ed. 1970).

[4] "The decisions there were premised on considerations of equity practice and comity in our federal system that have little force in the absence of a pending state proceeding." *Lake Carriers' Assoc. v. MacMullan*, ... U. S. ...., 32 L. Ed. 257, 268 (1972).

Conversely, the same expense considerations operate against federal intervention where a state proceeeding is already underway.

> The pending state proceeding ordinarily provides an existent, concrete opportunity to secure vindication of constitutional claims in the state courts, with ultimate review by this Court. In this situation collateral resort to a federal court will not speed up the resolution of the controversy since that will not come to an end in any event until the state litigation is concluded. Moreover, federal intervention may disrupt the state proceeding through the issuance of necessary stays or the burdensome necessity for the parties to proceed in two courts simultaneously. Federal adjudication of the matters at issue in the state proceeding may otherwise be an unwarranted and unseemly duplication of the State's own adjudicative process.

Perez v. Ledesma, 401 U. S. 82, 121 (1971) (Brennan, J., concurring in part and dissenting in part).

The duplication of costs of such federal adjudication superimposed on state proceedings has been said to imply that state courts are either incapable or unwilling to vindicate federal constitutional rights. *Wulp v. Corcoran,* 454 F. (2d) 821, 831 (1st Cir. 1972). But it should never be forgotten that the Constitution literally calls state judges by name (there were no federal judges) and puts upon them the obligation to apply the supreme Law of the Land. U. S. Const. art. VI. Because of the costs involved, in terms of both time and money, the divisive effect of unnecessary friction between coordinate courts, and the clear obligation of state courts to decide questions arising under the Constitution, U. S. Const. art. VI; *Erdmann v. Stevens,* 458 F. (2d) 1205, 1211 (2d Cir. 1972), there is a presumption against federal interference. *See The Supreme Court, 1970 Term,* 85 Harv. L. Rev. 3, 303 (1971).

This presumption against federal interference reflects two of the prerequisites to obtaining equitable relief—that the moving party will suffer irreparable injury and that there is not an adequate remedy at law. *Younger,* at 43-44.

To establish these criteria in a case where a state proceeding has already been commenced, the federal plaintiff must prove that the threat to his rights is both great and immediate,[5] and is such that it cannot be eliminated by his defense of the single civil action. *Younger*, at 46. *Cousins v. Wigoda*, 23 L. Ed. (2d) at 20. A district court thus cannot enjoin a state civil proceeding unless he finds that the state proceeding cannot eliminate the threat to the plaintiff's rights.[6]

In the case of *Machesky v. Bizzell*, 414 F. (2d) 283 (5th Cir. 1969), the Fifth Circuit attempted to draw the line of irreparable injury somewhat differently where "public" as opposed to "private" rights were involved. Under this rationale a federal court would not yield to comity, but would be empowered to enjoin all state court proceedings to the extent they violated first amendment rights. 414 F. (2d) at 291.

Despite the "firstness" of the first amendment, we do not believe that every case asserting a first amendment violation is a proper one for a federal court to interfere with a state proceeding. Indeed, this is the teaching of *Younger* itself. Even the case of *Dombrowski v. Pfister*, 380 U. S. 479 (1965) does not stand "for the proposition that a federal court can properly enjoin enforcement of a statute solely on the basis of a showing that the statute 'on its face' abridges first amendment rights." *Younger*, at 53.

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[5] The requirement that there be irreparable injury which is both great and immediate was stated in a criminal context. *Younger*, at 46. It has been suggested that perhaps the test may be less stringent in a civil case. See *Cousins v. Wigoda*, ... U. S. ...., 23 L. Ed. (2d) 15, 20 (1972) (Rhenquist, Circuit Justice). While the offense to a state interest may be less in a civil proceeding than in a criminal proceeding, *Younger*, at 55n.2 (Stewart, J., concurring), also the burden on the individual if left to his state court remedies is less severe in the civil context. In requiring a federal plaintiff to defend a state civil action there is no exposure to criminal penalties which could cumulate during the pendency of the action. *Cf. Wulp v. Corcoran*, 454 F. (2d) 826, 831 (1st Cir. 1972). Moreover, when coordinate courts are on collision course the disruptive effect on federalism is not likely to be dissipated by assurance that only civil jurisdiction is involved.

[6] *Byrne v. Karalexis*, 401 U. S. 216, 220 (1971).

Requiring a plaintiff to pursue his remedies in a pending proceeding is based solely on principles of equity. There is no requirement that a federal plaintiff exhaust state remedies before proceding under 42 U. S. C., § 1983. *Monroe v. Pape*, 365 U. S. 167, 183 (1961).

Thus even in the area of first amendment rights, circumstances in addition to a chilling effect, such as those present in *Dombrowski,*[7] must be present before a federal equity court should intervene in a state proceeding already commenced.

IV

Thus we must look to the facts of the present case to determine if there are special circumstances which will justify the intervention by a federal court of equity in the state court proceeding. That is, we must determine if the plaintiffs have shown injury which could not be dissipated should these plaintiffs defend in the state civil proceeding; irreparable injury which is both great and immediate; and, a case reasonably free from doubt.

It is true that the order of the superior court is possibly overbroad. It imposes a prior restaraint on any and all visits by these plaintiffs and other members of the public to all ten high schools and about 20 junior high schools in a county with over a twelve-mile radius. But there is no evidence in the record of disruption or threatened disruption except at one high school. There is, however, no allegation or showing that what overbreadth there exists in the superior court orders cannot be cured by an immediate appeal to the state appellate courts, the use of prerogative writs by those courts, or even by defending at the final trial on the merits before the superior court. There has been no allegation or showing on the record here that the judicial machinery of the state is being utilized in bad faith or for harassment. Furthermore, requiring the plaintiffs to first seek vindication of their rights in the pending state court proceeding will not expose them to the risk of possible loss of liberty. The record is thus void of any indication that the plaintiff's remedy at law in the state court proceeding is inadequate or that there is present irreparable injury sufficient to justify federal intervention.

While not expressing approval of such broad *ex parte* injunctions as those issued by the superior court, we note that the question of their validity is not free from doubt.

[7] *See Younger,* at 49-51; *Cameron v. Johnson,* 390 U. S. 611 (1968).

See Gerbert v. Hoffman, 328 F. Supp. 574 (E. D. Pa. 1971). For example, one federal district court in a similar context has gone so far as to prohibit **students** from airing their grievances near school buildings. *Montgomery County Bd. of Educ. v. Shelton,* 327 F. Supp. 811, 813 (N. D. Miss. 1971). Such an injunction goes further than the one present here since the extent of the first amendment rights of students has been expostulated by the Supreme Court. *See Tinker v. Des Moines Community School Dist.,* 393 U. S. 503 (1969). A question not yet dealt with, however, and the question presented here is how the right, if any, of a **non-student** to use the schools as a forum for expression and the conflicting right of school authorities to preserve order may be balanced and resolved. Having found equitable relief to be improper in this case, we need not now decide that difficult question.

Since the plaintiffs below failed to show great and immediate irreparable injury, that their rights would not be protected in the state proceedings, and a case reasonably free from doubt, the district court exceeded its equitable discretion in granting injunctive relief. Accordingly, the district court's grant of a preliminary injunction will be

REVERSED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-2377

PHYLLIS LYNCH, KELLY M. ALEXANDER, JR., ROBERT STEELE AND FLEDORA GRIER, APPELLEES,

versus

FRANK W. SNEPP, THOMAS F. MOORE, JR., DONALD W. STAHL, APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

This cause came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

WILLIAM K. SLATE, II,
Clerk.

FILED:
January 26, 1973.

WILLIAM K. SLATE, II,
Clerk.

A True Copy, Teste:
WILLIAM K. SLATE, II,
Clerk.

By: J. V. BRYANT,
Deputy Clerk.

IN THE FOURTH CIRCUIT COURT OF JUSTICE
GEORGE DALY, PLAINTIFF,

versus

THE CHARLOTTE OBSERVER, NANCY BRACHEY, AND CHARLES LLOYD, DEFENDANTS

COMPLAINT

To HON. J. BRAXTON CRAVEN:

Plaintiff, complaining of defendants, says:

JURISDICTION

1. This is a suit based on equity, the New Testament and the First Amendment.

PARTIES

2. Plaintiff is a citizen of these United States.

3. Defendant Brachey is an employee of the Defendant Charlotte Observer, a daily newspaper of general circulation in Mecklenburg County, North Carolina. Defendant Lloyd is an Assistant Attorney General of North-Carolina.

CAUSE OF ACTION

4. Defendant Lloyd supped with plaintiff on November 20, 1972, preparatory to their proposed joint journey to Your Honor to argue Defendant Lloyd's motion for stay in *Lynch v. Snepp*, No. C-C-72-252, U. S. District Court for the Western District of North Carolina. During the course of the evening, Defendant Lloyd convinced plaintiff that Defendant Lloyd was only ritually moving for a stay, and that plaintiff need not appear. Laden with strong drink and fearing the cold, grey dawn, plaintiff succumbed to Defendant Lloyd's blandishments, and spent the early part of the next day, November 21, 1972, otherwise engaged in the pursuit of truth. Defendant Lloyd meanwhile journeyed to Your Honor, upon information and belief insinuated that justice was being disserved by the order of the District Court, and betrayed plaintiff by securing a partial stay.

5. Thereupon Defendant Brachey, acting in the course and scope of her employment, telephoned plaintiff and asked for comment. Plaintiff replied:

> "The seeming ease with which Judge Craven, who heard no testimony, stayed Judge McMillan, who heard live testimony, puts me in mind of a recent remark by a noted jurist: 'Marshal Foch, when jumped over the heads of senior officers, is supposed to have said to Lloyd George that the higher one goes the easier it gets'." *

6. Defendant Brachey refused to print plaintiff's comment, in violation of plaintiff's First Amendment rights.

WHEREFORE, Plaintiff prays that Defendant Lloyd be ordered to hang himself, and that Defendants Brachey and the Charlotte Observer be ordered to print plaintiff's comment.

This 22nd day of November, 1972.

/s/ GEORGE S. DALY, JR.,
Pro Se,
700 Law Bldg.,
Charlotte, N. C.

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* From "Paean to Pragmatism" published by Judge Craven in The North Carolina Law Review the previous day.

IN THE FOURTH CIRCUIT
COURT OF APPEALS, APPEALS, APPEALS

GEORGE DALY, PLAINTIFF,

versus

THE CHARLOTTE OBSERVER, NANCY BRACHEY, AND CHARLES LLOYD, DEFENDANTS

ORDER OF REMAND WITH INSTRUCTIONS

To: THE HONORABLE JAMES B. McMILLAN
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

At the outset I want to make it perfectly clear that I am not in the least excited about this matter, and approach it with my customary calm deliberation. If I should italicize more words than is usual, it is done solely for the purpose of clarity and emphasis and is not meant to indicate impatience.[1]

In *Jones v. Superintendent* we patiently explained to the public and to the bar that because of our heavy caseload summary procedures were necessary for the effective administration of justice. We adhere to that viewpoint and would add that when we spoke of "justice" we had in mind the abstraction rather than the reality. One trouble we have with *pro se* petitions is that they are dumb. It is, of course, a perversion of *Gideon* to permit them, and we reserve the right, at any moment and without notice, to cut them off. This complaint is worse than frivolous. Even a first year law student should know that this is **not**, repeat, **not, not** a court of justice, but is, instead, a court of **appeals**. It is common knowledge at the bar that appeals have no more to do with justice than does law. This is so because

[1] My Brothers have from time to time suggested that I may have the lowest indignation threshold on the court. I accept the dubious compliment because I get so few, but this is an occasion for sorrow rather than indignation.

a stream can rise no higher than its source, and the source is in the first instance in the Congress and secondarily in the United States District Courts. Indeed, one need not be a lawyer to know that there is no justice. Every day the cry is heard on the streets, and yet *pro se* petitioners continue to seek it to our considerable frustration. It is true, of course, that the Constitution speaks in terms of justice, but the life of the law is not logic but experience, and 200 years of history have made it perfectly clear that our system is **not** one of justice but, instead, one of law.

Coming to the complaint, I need not exposit the proposition that law, since it does not embrace justice, cannot *a fortiorari* take into court to the slightest degree moral and ethical principles. I have no criticism of the New Testament, but it should be kept in its place, which is the Church, and not wandering around in the courtroom. As for the first amendment, it has been used excessively in the last decade and is simply tired.[2] I perceive no equity except in the fireside sense. As used in the courts, equitable maxims have about the same impact as a pleasant goodbye, *e. g.*, "The same to you, Mac."

I could not care less that plaintiff is a citizen of these United States. *Pro se* petitioner is doubtless trying to suggest, and we must read him liberally, diversity of citizenship—but none appears. Only by interpolation can I make out the slightest suggestion of federal question jurisdiction. It is true that the first amendment is in the Constitution, but, as I have said, it is tired and very much needs a rest. Moreover, there is no allegation of the minimum requisite amount in controversy. It is scarcely conceivable that printing the libelous statement contained in paragraph 5 of the complaint could be worth $10,000.00 to the *pro se* petitioner. On the other hand, it is certainly worth $10,000.00 to me that it **not** be printed. It is not difficult to balance the equities (in a legal sense, of course). Secondly, the unprinted (thank God) comment to the press, although not hardcore pornography, is certainly without redeeming social merit, and is clearly subversive of the hierarchical

[2] Moreover, it has never been very popular, and in a referendum would probably not run as well as Galifinakis.

structure of the courts, tending to put into disrepute the authority of a Circuit Judge over a little old district judge. Wise indeed was defendant Brachey in refusing to print plaintiff's comment.

On remand, consonant with our usual practice, which we probably ought to change, petitioner will be allowed to amend his complaint. Thus, I do not reach the merits. Purely to avoid successive appeals, and for the guidance of the district judge, I do, however, offer these comments. Whether or not Lloyd should be ordered to hang himself seems to me to be within the sound discretion of the district judge. But if, unbelievably, the district judge should undertake to permit the printing of plaintiff's comment to the press, I am quite certain that it would be an abuse of discretion, and, whether or not there is another appeal, I would want another crack at it.

IT IS ORDERED that on remand triple costs be taxed against the *pro se* petitioner.[3]

NOW, THEREFORE, *ex mero motu*[4] and *sua sponte*,[5]

IT IS ORDERED, ADJUDGED AND DECREED that the case be, and it hereby is, remanded to the district court, who will doubtless, in the exercise of his sound discretion, dismiss the complaint.[6]

/s/ J. BRAXTON CRAVEN, JR.,
United States Circuit Judge.

* * *

[3] Somehow we have got to discourage this sort of thing.
[4] Japanese.
[5] Italian.
[6] I would do it myself but for the unfortunate gap of original jurisdiction in the court of appeals.

29 November, 1972

Honorable JAMES B. McMILLAN
United States District Judge
Western District of North Carolina
Charlotte Division
Charlotte, North Carolina

Re: DALY *v.* OBSERVER, *et al.*

Your Honor:

I respectfully pray that Your Honor refrain from exercising any jurisdiction, especially pendant, on the remand of the Honorable J. Braxton Craven, Jr., in the above-entitled cause.

Very truly yours,
ROBERT MORGAN,
Attorney General,

/s/ CHARLES A. LLOYD,
Assistant Attorney General.

CAL:gw

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE-WESTERN DISTRICT OF NORTH CAROLINA

ON REMAND FROM THE FOURTH CIRCUIT COURT OF APPEALS, APPEALS, APPEALS

GEORGE DALY, PLAINTIFF,

versus

THE CHARLOTTE OBSERVER, NANCY BRACHEY, AND CHARLES LLOYD, DEFENDANTS

ORDER

This case was remanded from a higher, and presumably wiser, court. This court is now in position to impose upon counsel for the plaintiff penalties for contempt appropriate to the situation.

Pragmaticism must prevail.

Counsel for the plaintiff has committed a breach of a lawyer's first and greatest duty to his client—that is, to

testify truthfully before the judge about all matters outside the record upon which appellate court judgments are traditionally [1] based. He has failed in this duty, and deserves short shrift here. In fairness, however, I cannot in good conscience impose any active penalty upon counsel, because the contempt of court was certainly not of this court nor within the jurisdiction of this court, and therefore, since this court obviously never exceeds its jurisdiction, the appropriate penalty cannot be imposed.

Remains only time for brief philosophy. The appellant has thus far been successful in restoring rule by fiat to one out of thirty schools involved in the original controversy. This is a three and one-third per cent gain for the forces of pragmaticism and abstention and comity.

Three and one-third percent is about the right proportion for comity and pragmaticism to prevail over constitutional justice.

Concluding, therefore, that despite his contempt of court, the plaintiff has been successful in spite of himself, and that the results of the contempt are *de minimis* and that all other worthwhile matters in controversy are moot or should be muted,

IT IS ORDERED, that the petition be dismissed and that in line with the current trend to oppress all organs of press and communication, the costs be paid by the defendant Brachey.

This 1st day of December, 1972.

/s/ JAMES B. McMILLAN,
United States District Judge.

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[1] Sometimes spelled "pragmatically".

PETITION

Filed October 27, 1972

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA,
COUNTY OF MECKLINBURG.

STATE OF NORTH CAROLINA EX REL,
THOMAS F. MOORE, JR.,

versus

JOHN DOE, RICHARD ROE, AND ALL OTHERS OF LIKE CLASS AND SITUATION, DEFENDANTS

NOW COMES your petitioner, Thomas F. Moore, Jr., as a duly elected Solicitor in and for the 26th Judicial District which includes the City of Charlotte and Mecklenburg County, and as a citizen and resident of Charlotte, North Carolina and respectfully shows the Court:

That on or about the 26th day of October, 1972, in the County of Mecklenburg at East Mecklenburg High School, a school within the control and supervision of the Charlotte-Mecklenburg Board of Education, certain disturbances took place, to wit: fighting, boisterousness, disorderly conduct, breaching of the peace, and order of that school; that several students of East Mecklenburg and non-students of East Mecklenburg were involved in this activity; that the names of these persons are unknown to the petitioner; that this disturbance did disrupt the good order of conduct of the business of East Mecklenburg High School;

That East Mecklenburg High School is but one of many schools within the jurisdiction of the Court and is but one of many schools within the control and supervision of Charlotte-Mecklenburg Board of Education;

That on the 27th day of October, 1972, there was at East Mecklenburg High School another disruption which caused disorder and disturbance at this school; that your petitioner does not know the names of the persons who were engaged in this disruption;

That your petitioner is informed and believes imminent at other high schools within the Charlotte-Mecklenburg school system;

That your petitioner is charged with the enforcing of the laws of the State of North Carolina and believes that he is further charged with the maintenance of the peace and order within the community over which he is the Solicitor;

That your petitioner believes upon information and belief that a statute of emergency exists or is imminent within the several schools of the Charlotte-Mecklenburg school system and prays the Court for injunctive relief directed against any and all persons who would disrupt the peace, dignity and good order of the schools within the Charlotte-Mecklenburg school system.

This the 27th day of October, 1972.

THOMAS F. MOORE, JR.,
Petitioner.

Sworn and subscribed before me
this the 27th day of October, 1972.

JANICE S. BEAVER,
Notary Public.

My Commission Expires: 3-4-76.

INJUNCTION

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

STATE OF NORTH CAROLINA,
COUNTY OF MECKLENBURG.

Filed OCTOBER 27, 1972

STATE OF NORTH CAROLINA, EX REL,
THOMAS F. MOORE, JR.,

versus

JOHN DOE, RICHARD ROE, AND ALL OTHERS OF LIKE CLASS AND SITUATION, DEFENDANTS

This cause came on to be heard before the undersigned Judge of the Superior Court;

It appears from the verified complaint of the plaintiff in this action that the operation of the Charlotte-Mecklenburg Schools has been disrupted and that the peace and harmony of the community Charlotte-Mecklenburg has been imperiled and that civil disorders have ensued from the conduct of the defendants set forth in the complaint, and that the continued peaceful operation of the Charlotte-Mecklenburg Schools has been placed in peril, and it further appears that the general welfare of all the citizens of the City of Charlotte and Mecklenburg County is threatened and that irreparable injury will be caused the plaintiff and the students of the public school system in Charlotte and Mecklenburg County unless the defendants are restrained as hereinafter ordered;

It is therefore ORDERED, ADJUDGED AND DECREED that the named defendants, and each of them and all persons acting in concert with them or under their direction or orders or under the direction of any of them, and all other persons to whom knowledge of this order may come, are, until further orders of this Court, hereby restrained and enjoined as follows:

1. From interfering with the operation of the public schools in the Charlotte-Mecklenburg in any manner or

form, including but not limited to the manners hereinafter set forth.

2. From assaulting, threatening, intimidating or abusing any student, faculty member, any member of the staff, any teacher or any member of the family of such parties for the purposes of interfering with the operation of the Charlotte-Mecklenburg Schools and discouraging attendance thereat.

3. From going in the buildings or on the grounds of any public school or any administrative offices of the public schools or any property of the Charlotte-Mecklenburg Board of Education within the Charlotte-Mecklenburg School District, or on any street adjacent thereto and from going in the vicinity thereof with following exceptions to this numbered paragraph:

(a) Students at the said schools who are attending classes or other regularly scheduled activities;

(b) Teachers, principals, staff and employees of the schools while in attendance to their regular and lawful duties;

(c) Those having permission from the school authorities and having business with the public schools;

(d) Law enforcement officers and public officials while in attendance to their regular and lawful duties;

(e) Parents or guardians of students attending the school while transporting those students to and from those schools.

4. From using any vile, abusive, violent or threatening language at or towards any person on the premises of the various schools within the Charlotte-Mecklenburg School District, or towards any person entering or leaving the same.

5. From interfering with or impeding in any manner any car or other vehicle including bicycles, while approach- or leaving the premises of the Charlotte-Mecklenburg Schools, and from in any other manner interfering with the free ingress or egress of any person or vehicle from the grounds of the various schools within the Charlotte-Mecklenburg School District and from any other property

of the Charlotte-Mecklenburg Board of Education or along or over any of the streets or roads adjacent thereto.

6. From counseling, procuring, commanding, aiding or abetting any person or persons to do any of the foregoing acts or otherwise causing them to be done.

This Order shall be effective forthwith.

It is further ORDERED AND DECREED that the Sheriff of Mecklenburg County shall immediately cause copies of this Order to be posted at conspicuous places at the schools in the Charlotte-Mecklenburg School District, and at the Board of Education Building of the City of Charlotte, and that copies be released to representatives of the press and radio and television media, and that all persons having knowledge thereof shall be bound thereby.

It is further ORDERED AND ADJUDGED that the defendants appear before the Honorable Frank W. Snepp, Judge of the Superior Court, in chambers in the courthouse in Charlotte, North Carolina, on the 30th day of October, 1972, at 9:30 o'clock a. m., and show cause, if any there be, why this order should not be continued until the final determination of this action.

This the 27th day of October, 1972.

FRANK W. SNEPP,
Judge Presiding.

ORDER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

Filed October 31, 1972

STATE OF NORTH CAROLINA,
COUNTY OF MECKLENBURG.

STATE OF NORTH CAROLINA, EX REL,
THOMAS F. MOORE, JR.,

versus

JOHN DOE, RICHARD ROE, AND ALL OTHERS OF LIKE CLASS AND SITUATION, DEFENDANTS

This action was initiated by a petition from The Honorable Thomas F. Moore, Jr., Solicitor of the 26th Judicial District. A temporary restraining order was signed by the undersigned Resident Judge of the Superior Court for the 26th Judicial District on October 27, 1972. As a part of that order it was provided that any persons included within the classification of the defendants who wished to do so might appear before the Court October 30, 1972, and show cause why the order should not be continued until the hearing.

The Court, having heard evidence offered by the State and arguments of counsel, makes the following Findings of Fact:

1. Petitioner Thomas F. Moore, Jr., is the Solicitor of the 26th Judicial District and is a citizen and resident of Charlotte, North Carolina.

2. Kelly Alexander, Jr., Robert Steele and Phyllis Lynch are citizens and residents of Mecklenburg County and within the class designated as defendants in this action.

3. East Mecklenburg High School is a school within the control and supervision of the Charlotte-Mecklenburg Board of Education.

4. That there are other schools within the control and supervision of the Charlotte-Mecklenburg Board of Education.

5. On October 24, 26, and 27, students at East Mecklenburg High School engaged in fights upon the school property and congregated in large groups on portions of the school campus.

6. On October 26, 1972, the Mecklenburg County police were summoned to the campus of East Mecklenburg High School by the principal as a result of fights and confrontations between students. Large groups of students numbering between sixty and seventy-five, when ordered by the principal to return to classes or leave the campus, entered the school buildings, shouted and made noise. Some individuals cursed and made threats to beat up people. Two students were arrested on that date.

7. On October 27, 1972, two groups of students, numbering about two hundred each, confronted each other on the school campus and fights broke out between some fifteen to twenty persons. Upon being ordered by the school principal to go to class or leave, the members of one group left or went to classes and the other group headed back to the school buildings. Eight persons were arrested on that date.

8. During this period rumors have gone about the campus that certain persons had weapons in automobiles in the parking lot, as a result of which trouble increased.

9. The normal enrollment at East Mecklenburg High School is 2,350 students enrolled in the tenth, eleventh and twelfth grades. On Friday, October 27, 1972, thirty per cent of the students were absent from class as compared to the usual absence of ten per cent to fifteen per cent. School officials cancelled a football game scheduled to be held on Friday night because of the trouble.

10. On October 28, 1972, two students who engaged in a fight were immediately suspended, but did not leave the campus as directed and assaulted other students.

11. On Monday, October 30, 1972, the Board of Education ordered that because of the disturbances only the seniors in the student body report for classes on that day.

12. During the period of the disturbances at East Mecklenburg High School reports of disturbances at other

schools which are part of the Charlotte-Mecklenburg school system were reported to the headquarters of the Board.

13. At least one participant in the disturbance at East Mecklenburg High School was not a student enrolled at the school.

14. During the immediately preceding school year it was the experience that when disturbances began at one school they were shortly followed by disturbances at other schools.

15. The Court takes judicial notice of the fact that the disturbances at East Mecklenburg High School occurred shortly after there was widespread coverage in the news media in the area of disturbances in Buncombe County, North Carolina.

16. Because of the disturbances at East Mecklenburg High School, which have received extensive coverage in local news media, and based upon the pattern of previous school disturbances in Mecklenburg County, there exists a strong possibility that disturbances will spread to other schools of the system.

17. As a result of the disturbances at East Mecklenburg High School referred to above, the educational process at that institution has been seriously interfered with and students and parents, both at that institution and throughout the county, have become disturbed and fearful for the safety of students.

18. There is imminent danger that such disturbances will spread to other units of the school system in Mecklenburg County.

Based upon the foregoing, the Court concludes as a matter of law:

1. The Petitioner, Honorable Thomas F. Moore, Jr., as Solicitor for the 26th Judicial District, has authority and standing to bring this action upon behalf of the State of North Carolina.

2. This Court has jurisdiction to exercise its equitable powers to prevent further disturbances at East Mecklenburg High School and at other units of the Charlotte-Mecklenburg Board of Education.

3. Continuance of such disturbances threatens irreparable damage to all students of the Charlotte-Mecklenburg school system and to the peace and tranquility of the community.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the persons who have become parties hereto and all persons acting in concert with them, and all persons to whom knowledge of this order may come, are hereby restrained and enjoined as follows:

1. From threatening or intimidating any student enrolled in any high school or junior high school unit operated by the Mecklenburg County Board of Education, with the intent of interfering with the operation of such schools and discouraging attendance at such schools.

2. From going in the buildings or on the grounds of any high school or junior high school which is a unit of the Charlotte-Mecklenburg Board of Education, with the following exceptions:

(a) Students at said schools attending classes or other regularly scheduled activities of the schools.

(b) Teachers, administrative employees, staff members and other employees of the schools, while in attendance to their regular duties.

(c) Persons having permission from the Administrative officers of the Charlotte-Mecklenburg Board of Education or from school principals.

(d) Members of the news media.

(e) Law enforcement officers and public officials in the discharge of their duties.

(f) Parents or guardians of students attending the school or other persons transporting students to or from the school when such entry is reasonably necessary for the purpose of such transportation.

3. From interfering with the orderly operation of all buses used in the regular transportation of students to and from schools of the Charlotte-Mecklenburg school system, whether the same be publicly or privately owned.

4. From threatening or intimidating with intent to interfere with the operation of the Charlotte-Mecklenburg schools and discouraging attendance thereat, any students waiting for, upon, or coming from buses employed to transport such students to and from the schools of the Charlotte-Mecklenburg system.

5. This order shall be effective forthwith.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Sheriff of Mecklenburg County shall immediately cause copies of this order to be posted at conspicuous places at the high schools and junior high schools under the jurisdiction of the Charlotte-Mecklenburg Board of Education, and at the Board of Education building in the City of Charlotte, and that copies be released to representatives of the press, radio and television media.

This order shall continue in effect pending further orders of this Court.

FRANK W. SNEPP,
Judge Presiding.

Issued this 31st day of October at 9 A. M.